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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6884

KEITH FAIR,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

APPENDICIES FOR BRIEF IN OPPOSITION

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APPENDIX A - APPELLANT'S BRIEF

TO THE SUPREME COURT OF GEORGIA

IN THE SUPREME COURT OF GEORGIA

CASE NUMBER 35701

KEITH FAIR,

APPELLANT

Vs.

THE STATE,

APPELLEE

BRIEF OF APPELLANT

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PART I

STATEMENT OF THE CASE

On or about May 8, 1979, Appellant and Becky Nations were riding around drinking and stopped at Dexter Thomas's house (T-407). Appellant had been drinking quite a bit and, in fact, had consumed over a quart of Canadian Mist liquor (T-407).

At this point, because Appellant's counsel objected to all testimony and evidence with respect to any incidence involving the Appellant in Habersham County, and particularly because Appellant has since been acquitted of any offense in Habersham County (see Exhibit "B"), the Statement of the Case will limit itself to a discussion of what occurred in Hall County.

Later in the evening on May 8, 1979 Appellant, Becky Nations, Jackie Morris (victim), Dexter Thomas, and Sherill Land met at a Huddle House in Gainesville, Georgia (T-408, 409). Appellant left the Huddle House and went to Bradley Highfield's house to borrow Highfield's car because Appellant's car was not operating properly (T-409, 410). Appellant continued to drink throughout the entire evening (T-413).

By this time, Morris, Thomas and Land had already left the Huddle House so Appellant, Nations and Highfield started towards Cornelia whereupon they re-established contact with Morris, Thomas and Land (T-411).

Appellant and the entire group then went to B-Minor Road to

Morris' car (T-412). During the discussions with respect to the burning of Morris' car, Appellant and Morris began arguing "real heavy" and Appellant shot Morris (T-414). Thomas and Appellant then placed the body of Morris in Morris' car (T-416). Thomas then set fire to Morris' car and Appellant and Highfield then carried Thomas, Land and Nations home (T-417). On the way home, Thomas remarked how Morris had the toughest skin that he had ever seen (T-418). All persons in the car at that time were of the opinion that nothing should be said about what had occurred on B-Minor Road (T-418).

During Appellant's incarceration, prior to trial, others in the jail with him had opportunities to read some of the witnesses' statements and the like which Appellant had in his possession (T-423).

In mitigation, Appellant had several witnesses testify as to Appellant's character (T-443, 455).

After pretrial motions and other matters were concluded by the trial court, Appellant announced that he wanted to plead guilty to the murder of Jackie Morris (T-3-21). The trial judge accepted the plea and conducted without a jury a full scale trial on the issue of mitigation or aggravation to determine whether life imprisonment or the death penalty would be imposed as punishment.

After the trial and deliberation, the trial judge orally announced that the death penalty would be imposed and Appellant immediately withdrew his plea of guilty orally and by written

withdrawal (T-484, 487). The trial court refused Appellant's timely withdrawal and refused Appellant's request for an evidentiary hearing (T-491, R-9-22). Subsequent motions were filed and denied by the trial court and the instant appeal, being automatic, was taken.

IN THE SUPREME COURT OF GEORGIA

CASE NUMBER 35701

KEITH FAIR,

APPELLANT

Vs.

THE STATE,

APPELLEE

PART II

APPELLANT'S
ENUMERATIONS OF ERROR

1.

The lower court erred in denying Appellant's motion to strike as unconstitutional the Georgia statute providing for the imposition of the death penalty (R-92, R-139, 140).

2.

The lower court erred in allowing prejudicial testimony and evidence relating to a separate charge of murder in Habersham County in the trial of this case and in relying on this evidence as a statutory aggravating circumstance warranting the

imposition of the death penalty sentence before the guilt or innocence of the Appellant was determined by the proper forum in Habersham County. (See Exhibit "A" for digest of objections and rulings).

3.

The lower court erred in denying Appellant's motion for directed verdict of life sentence (T-376, 455) or motion for judgment notwithstanding the verdict for life sentence (R-139).

4.

The lower court erred in allowing evidence over objection of Appellant as to escape (T-325, 326, 328, 356, 34, 37) and prejudicial unrelated and remote occurrences and events (T-325, 326, 328, 356, 34, 37, 327, 328, 361-363).

5.

The lower court erred in allowing photographs of Hoyt Turner and Jackie Morris in evidence over objection of Appellant (T-29, 33, 47, 51, 57, 60, 61, 62, 63, 64, 74, 75, 76, 78, 108, 129).

6.

The lower court erred in imposing the death penalty without consideration of the Appellant's intoxication at the time of commission of the crime as a mitigating factor and without considering the rule of law in Thomas v. State, 240 Ga. 403.

7.

The trial court erred in refusing to allow the Appellant to withdraw his guilty plea as a matter of right prior to pronouncement of sentence. (T-484, 487).

8.

The trial court abused its discretion by denying Appellant's motion to withdraw his plea of guilty after pronouncement of sentence. (R.9-22).

9.

The trial court erred in denying Appellant's oral and written motions for an evidentiary hearing with respect to what transpired at Appellant's sentencing hearing (R.9-22).

10.

The trial court erred in denying Appellant's motion for new trial (R-139, 149).

PART III

ARGUMENT AND CITATION OF AUTHORITIES

1.

By enumeration of error numbered 1, defendant assigns as error the court's denial of defendant's motion (R-92) to strike as unconstitutional the Georgia statute providing for the imposition of the death penalty (R-92,139,140).

This statute should be quashed and held unconstitutional in that it is applied in a way that violates the constitutional prohibition against the use of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and the rule of law espoused and mandated in Furman v. Georgia 408 U.S. 238 (1972).

Georgia Laws 1973, pp. 159, 163 (Ga. Code §27-2534.1) is discretionary and is applied discriminatorily against certain classes of defendants in violation of the Due Porcess and Equal Protection Clauses of Art. I., Sec. I, Pars. II and III of the Georgia Constitution (Ga. Code §2-102) and of the Fourteenth Amendment to the United States Constitution.

The categories of aggravating circumstances in Georgia Laws 1973, pp. 159, 163 (Ga. Code §27-2534.1) are applied in an unreasonable and arbitrary manner in violation of the Equal Protection Clause of Art. I, Sec. I, Par. II of the Georgia Constitution (Ga. Code §2-102) and of the Fourteenth Amendment

to the United States Constitution.

Georgia Laws 1974, pp. 352, 353 (Ga. Code §27-2302) allows the jury subjective discretion in applying the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Georgia Laws 1973, pp. 159, 165 (Ga. Code §27-2537(f)), provides for the collection of data on sentences imposed in capital felony cases after January 1, 1970, for purposes of reviewing death sentences as excessive, disproportionate or arbitrary. The statutory check against the arbitrary and discriminatory application of the death penalty is not being complied with, thereby depriving defendants sentenced to death of an effective or adequate review of their sentence in violation of due process of law.

Georgia Laws 1973, pp. 159, 163 (Ga. Code §27-2534.1), is applied arbitrarily and discriminatorily against certain classes of defendants in violation of the Due Process and Equal Protection Clauses of Art. I, Sec. I, Pars. II and III of the Georgia Constitution (Ga. Code §§2-102, 2-103) and the Fourteenth Amendment to the United States Constitution, in that the Georgia Supreme Court compares death cases only with those cases in which a death sentence has been received and in which it has upheld that death sentence.

Georgia Laws 1973, pp. 159, 163 (Ga. Code §27-2534.1), is applied arbitarily and discriminatorily against certain classes of defendants in violation of the Due Process and Equal

Protection Clauses of Art. I, Sec. I, Pars. II and III of the Georgia Constitution (Ga. Code §§2-102, 2-103), and the Fourteenth Amendment to the United States Constitution, and in violation of the United States Supreme Court's mandate in Gregg v. Georgia, 428 U.S. 153 (1976), in that the Georgia Supreme Court does not submit written findings comparing cases in which it reviews death sentences with similar cases, but merely lists other cases and states that it has made the required comparison. Such a procedure prohibits a defendant from challenging the affirmation of his/her death sentence as arbitrary and discriminatory, because the defendant is given no notice as to which permissible factors the Court has used in such comparison.

2.

By enumeration of error numbered 2, Appellant assigns as error the Court's allowance of evidence and testimony relating to separate charges filed against him in Habersham County, which evidence was relief upon and cited by the Court as an aggravating circumstance supporting the imposition of the death penalty sentence. (See Exhibit "A" for objections and rulings).

Consider, please, these circumstances:

1) The Appellant is charged with the murder of Hoyt Turner in Habersham County alleging that the Appellant shot Turner on May 8, 1979 in Habersham County and disposed of his body in Lake Lanier. Trial is scheduled in November, 1979,

with Bruce Harvey, a Habersham County attorney appointed by the Court to represent him (T-66).

2) The Appellant is charged with the murder of Jackie Morris in Hall County alleging that the Appellant shot Morris on May 9, 1979 in Hall County and disposed of his body by burning it in an automobile. Hall County attorneys are appointed to represent the Appellant for the Hall County charge.

3) The Appellant tenders a plea of guilty in Hall County Superior Court and the punishment issue is tried before the Hall County Superior Court on August 14, 1979 (T-20).

4) Before trial or disposition of the Habersham County indictment, the Hall County court rules admissible voluminous and extended testimony and evidence of the Habersham County charge of murder on the theory of showing motive and identity under New v. State, 67 Ga. App. 442 over repeated objections. (See Exhibit "A").

5) The Appellant testified and admits guilt in the Hall County charge of murder, but under advice from his Habersham County attorney, Bruce Harvey, and Hall County attorneys, invokes his Fifth Amendment privilege against incrimination when questioned concerning the Habersham County charge (T-426, 432, 433, 437, 439, 441, 454).

6) The Court receives this evidence and imposes the death sentence, citing as an aggravating circumstance the Appellant's commission of another capital felony at the time of the Hall County murder, that being the murder of Hoyt Turner

in Habersham County (T-492-494).

7) The Appellant, tried later in Habersham Superior Court for the murder of Hoyt Turner, is acquitted of that offense.

THE HALL COUNTY SUPERIOR COURT ALLOWED EVIDENCE IN THE TRIAL OF THE MURDER OF JACKIE MORRIS WHICH NAMED APPELLANT AS THE MURDERER OF HOYT TURNER IN HABERSHAM COUNTY. WITHOUT CONSIDERATION OF THE RIGHT OF THE APPELLANT TO ANSWER TO THOSE ALLEGATIONS IN HABERSHAM COUNTY WITH HIS HABERSHAM COUNTY COUNSEL, THE HALL COUNTY SUPERIOR COURT SUMMARILY HELD THAT APPELLANT WAS GUILTY OF BOTH MURDERS AND IMPOSED THE DEATH PENALTY ON THE BASIS OF GA. CODE ANN. §27-2534.1(b)(2), WHICH CHARGE THE APPELLANT WAS LATER ACQUITTED!

This disgraceful miscarriage of justice resulted from the dilemma in which the Appellant found himself with indictments returned against him in two different counties with separate legal counsel assigned in each county. Voluminous evidence concerning the separately indicted Habersham County charge was allowed over objection to explain "motive," "identity," "res gestae," and "course of conduct." Appellant's Habersham County attorney, lacking standing in Hall County Superior Court (T-69, 401-404) to object or conduct the trial of the case, directed the Appellant to invoke his Fifth Amendment right against self-incrimination (T-402, 426).

Mistakenly following New v. State, 67 Ga. App. 442, which allowed evidence of similar crimes to show motive and

identity even before conviction, the Court used this kangaroo court finding of guilt in Habersham County as a springboard for the imposition of the death sentence, by treating it as an aggravating circumstance. Although juries in many cases have used evidence of the guilt of one capital felony to provide the aggravation required for the imposition of the death penalty for another capital felony, these charges have all been tried before the same forum (Example: Pryor v. The State, 238 Ga. 698).

Georgia Code Ann. §27-2534.1(b)(1) applies where a prior conviction of a capital felony is cited for aggravating circumstances, which of course implies that the appellate process for the prior conviction would have to be exhausted before it could rise to the level of an aggravating circumstance.

Evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent for which he is on trial, even though it be a crime of the same sort, is irrelevant and inadmissible. Williams v. State, 152 Ga. 521. A somewhat similar situation was presented in Kincaid v. The State, 136 Ga. App. 732, where the State introduced evidence as to "other search warrants in which they (defendants) were involved, but were not convicted." (p. 733). Without any showing that guilt was proven against the defendant because of such previous search warrants and searches, the Court reversed the conviction because it placed the defendant's character into issue and was highly improper. To introduce prejudicial evidence in this case as to then unresolved charges

in Habersham County is similar error, and should be corrected by this Court.

3.

By enumeration of error numbered 3, Appellant assigns as error the Court's refusal to direct a verdict of life sentence because of the failure of the State to prove the existence of aggravating circumstances beyond a reasonable doubt (T-376, 455, R-139).

The State in this case relied on two aggravating circumstances for their demand for the death penalty under Ga. Code Ann. §27-2534.1(b)(1-10):

(1) That the offense of murder of Jackie Morris was committed while the Appellant Keith Fair was engaged in the commission of another capital felony, to-wit: the murder of Hoyt Turner in Habersham County.

(2) That the offense of murder of the victim in this case was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim (R-32).

It is unconceivable that the first aggravating circumstance is present since the Appellant has since been acquitted of the charge of murder of Hoyt Turner in Habersham County (Exhibit "B"), and it was error for the Court to consider evidence as to this charge and summarily imply guilt when the disposition of that charge was settled in a different forum. (See Enumeration of Error No. 2).

As to the second aggravating circumstance, the finding

and order of the lower court on its face (R-98), is insufficient as a matter of law under Ga. Code Ann. §27-2534.1(b)(7) because it found no evidence of torture of the victim. In Harris v. State, 237 Ga. 732, the Court stated:

> "This aggravating circumstance (§27-2534.1(b)(7) involves both the effect on the victim, viz., torture, or an aggravated battery, and the offender, viz., depravity of mind. As to both parties the test is that the acts (the offense) were outrageously or wantonly vile, horrible, or inhuman."

The Court continued by adding at p. 732:

> "Under our duty specified in Code Ann. §27-2537(c)(2) we have no intention of permitting this statutory aggravating circumstance to become a 'catch all' for cases simply because no other statutory aggravating circumstance is raised by the evidence."

An examination of the case cited in Harris v. State, supra, as examples of proper (b)(7) examples illustrate the necessity of evidence as to both aspects of this aggravating circumstances. In every example, the evidence illustrated both depravity of mind on the part of the defendant and either torture or aggravated battery to the victim. House v. State, 232 Ga. 140; McCorquodale v. State, 233 Ga. 369; Banks v. State, 237 Ga. 325.

The lack of torture or aggravated battery is apparent in this case from the testimony of the State's witness, pathologist doctor, Byron Dawson of the State Crime Lab (T-145):

> "Q. Doctor Dawson, I asked you whether or not in your autopsy of Jackie Morris, and in your medical opinion, and from your experience as a pathologist whether or not you found any evidence whatsoever of torture, and I believe that your response was that you did not find any such evidence, is that correct."
>
> A. That's correct, again with the qualification that were there or had there been injuries which were destroyed by the fire then that would be a different story, but withstanding those - or imposing that qualification the answer is - well, I forgot now how you phrased it, but the answer is that I saw no evidence that would be.. or, no injuries, or other findings that would be consistent with a torture."

Dr. Dawson on page 148 of the transcript further explains his opinion:

> "Q. What is your conception of torture, doctor?
>
> A. Well, I don't know that I've ever tried to answer that, that might be difficult to answer.

I think from the standpoint of this sort of work that I would be involved in, that is the examination of people who die as a result oftentimes of traumatic injury that my answer would have to be something which causes pain or injury which is less than fatal over a period of time which is more than, let's say, a few short minutes, that is something which is prolonged which is designed to injure - or let me rephrase that - which is prolonged, which is designed to cause pain and which may result in injury... injuries which at least at the outset are not sufficient to cause death."

Dr. Dawson testified further that although the body of Jackie Morris had been burned, that this was done after death and therefore could not be considered a torture to the victim or aggravated battery (T-143). Dawson's testimony further raised the reasonable conclusion that although Morris was shot at least three times, two shots were fired in the head of the victim and that if either of those two shots were fired first, the victim was rendered unconscious rapidly and had no conscious sense of further pain (T-136, 137, 143-144). The state having the burden of showing the existence of this aggravating circumstance beyond a reasonable doubt, the evidence fails to exclude the reasonable hypothesis that Morris was shot in the head

initially and thereafter had no conscious pain or suffering, regardless of subsequent shots.

The presumption of innocence of all is so strong that every reasonable doubt must be resolved in favor of the accused if there is any fact or circumstance that is susceptible of two interpreations. Johnson v. State, 13 Ga. App. 586. Where the facts and evidence and all reasonable deductions therefrom present two theories, the justice and humanity of law compel the acceptance of the theory consistent with or favoring the defendant. Patrick v. State, 75 Ga. App. 687; David v. State, 13 Ga. App. 142.

Because the State believes that the victim might have been shot first in the neck and suffered before the fatal shots were fired to the head raises suspicion of torture but does not exclude the reasonable hypothesis that the shot to the victim's neck occurred after the shot or shots to the head resulting in unconsciousness, and will not support this aggravating circumstance. Burkhalter v. State, 125 Ga. App. 386.

Furthermore, the evidence shows that the Appellant shot the victim while intoxicated (T-187, 188, 201, 209, 223, 227, 269, 291, 322, 364, 413, 410) over an argument with the victim (T-43) concerning the method of stripping and burning of the victim's car and concerning the recollation of prior misdeeds of the victim against the Appellant (T-414). An examination of the transcript of evidence of this case in comparison with other cases where the death penalty was invoked and upheld shows a

distinct lack of facts and evidence supporting a showing or an outrageously or wantonly vile, horrible, or inhuman murder. This case simply does not warrant the imposition of the death penalty sentence. Ga. Code Ann. §27-2537(c)(2)(3); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909.

The lower court erred in not directing a verdict or granting the motion for judgment notwithstanding the verdict for a life sentence, and the error should be corrected by this Court.

4.

By enumeration of error numbered 4, Appellant assigns as error the lower court's ruling allowing extensive evidence concerning escape and unrelated prejudicial events remote in time to the crime which injected prejudice and bias into the case and wrongfully brought the Appellant's character into evidence. (T-34, 37, 325, 327, 328, 356, 361-363).

Testimony concerning jail conditions (T-325), concerning Appellant's plans for escape (T-326), and concerning "how he (Appellant) felt about being shot" (T-361-363) went far outside of the use of escape testimony to show the guilt of the accused. Allen v. U.S., 164 U.S. 492.

This testimony flagrantly violated the rule of evidence forbidding introduction of evidence of other crimes of the accused to show bad character. Robinson v. State, 62 Ga. App. 355. It injected prejudice and bias into the case which was reflected by the sentence of the Court. The testimony was too remote to

have any probative value or relevancy to the charge being tried, and as such should have been excluded on that basis. Ludwig v. J.J. Newberry Co., 78 Ga. App. 871. This error should be corrected by this Court.

5.

By enumeration of error numbered 5, Appellant assigns as error the introduction of photographs of bodies of Hoyt Turner and Jackie Morris over objection by Appellant. The introduction of these photographs was totally irrelevant and immaterial since Appellant had admitted his guilt as to Jackie Morris, and the photographs graphically illustrated not his guilt, but his attempt to dispose of the body by burning it in an automobile. The effect of these photographs is to arouse the prejudice, passion, and bias against the Appellant, and they should not have been admitted (T-29, 33, 47, 51, 57, 60-64, 74-76, 78, 108, 129). Wilson v. State, 9 Ga. App. 274.

These photographs added nothing except the visual image to the mental image already produced by voluminous testimony concerning the events which led up to and caused the death of Jackie Morris.

The use of the numerous photographs of the dead bodies of both Hoyt Turner and Jackie Morris injected prejudice, bias, and irrelevancy into the case, which photographs were timely objected to, and were reflected in the sentence of the Court. The lower court erred in allowing these photographs into

evidence, and this error should be corrected by this Court. Eiland v. State, 130 Ga. App. 428.

6.

By enumeration of error numbered 6, Appellant assigns as error the Court's imposition of the death penalty without consideration of the Appellant's intoxication at the time of the commission of the crime as a mitigating factor. The trial court in his report to this Court (R-3) indicated that there were no mitigating factors to consider

But the evidence and testimony indicate that subsection (g) of that report was clearly present in the evidence as to intoxication. Becky Nations testified (T-187) that she and the Appellant had been drinking before they went to the party in Habersham County that day, and that he was as drunk as she was (T-188), having drunk a quart of liquor between them (T-189). Dexter Thomas testified that the drinking continued, and that several hours later in Habersham County the Appellant was still drunk (T-201). On the way back to Gainesville later, Thomas continued to describe the drinking of the Appellant (T-209).

Later testimony (T-223) indicated Appellant was mixing beer with liquor he had already consumed that day. In fact, this witness testified (Thomas) that Appellant drank continuously while he was driving (T-227).

Sheryl Land testified that everyone including the Appellant was drinking that night (T-269), and Highfield stated

that Appellant was drunk when he switched cars after arriving in Gainesville, minutes before shooting Morris (T-291, 322).

To impose the death sentence and to declare "I find beyond a reasonable doubt that there were aggravating circumstances as charged necessitating the imposition by this Court of the death penalty which I now impose" (R-102), ignores the mitigating circumstances of the testimony which are relevant to the Appellant which must be considered before imposing the death penalty. Fleming v. State, 240 Ga. 147.

To state that the finding of aggravating circumstances "necessitates" the death penalty completely ignores the principle of law that a life sentence would still be authorized under Thomas v. State, 240 Ga. 403.

Imposition of the death penalty without consideration of mitigating factors and without consideration of the rule of law in Thomas v. State is error, and should be corrected by this Court.

7.

As is accurately reflected in the report of the trial judge in this case, the basic right permitting a defendant to withdraw his guilty plea prior to pronouncement of judgment was codified in Cobbs Digest of the Laws of the State of Georgia in 1851 (R-12). Every Code beginning with the 1863 version has contained substantially the words which now appear as part of the present Code in Section 27-1404. This Code Section permits

a defendant to withdraw the plea of guilty "at anytime before judgment is pronounced". Ga. Code Ann. §27-1404.

Critical to a determination of when a sentence is "pronounced" is an examination of the origin of the definition of the word "pronouncement".

Three principal cases reveal the origin of the definition of the word "pronouncement" and trace the evolution of the right to withdraw the guilty plea before pronouncement. Upon reading the earlier cases, it becomes clear that the rule allowing a defendant the absolute right to withdraw his guilty plea at anytime before sentence is pronounced stems from old civil cases holding that a party may amend his pleadings anytime before judgment is entered.

The first case dealt with an appeal of a trial court's denial of a motion to amend a bond in a foreclosure proceeding. Lytle v. De Vaughn, 81 Ga. 226 (1888). De Vaughn foreclosed a mortgage upon certain personal property of Lytle. Fi fa issuing upon the foreclosure was levied on the property. Lytle filed an affidavit of illegality upon various grounds. He also gave a replevy bond. When the issue made by the illegality was called for trial, plaintiff moved to dismiss the illegality due to irregularities and errors contained in the bond. The Court announced that the motion was sustained, but before any entry thereof was made, defendant moved for leave to amend the bond so as to make it comply with the statute, which amendment was refused, Lytle, supra, pp. 226, 227. The judgment of the trial

court refusing the amendment was reversed. The Supreme Court held:

> "But it is said the offer was too late. We think it was in time, for although the court had announced orally that the motion of the opposite party to dismiss the illegality was granted, no order of dismissal had been entered, or sofar as appears signed, or even drawn up. The record indicates, or affords ground for inferring, that the offer was instant and immediate upon the oral announcement made by the court of its decision. That announcement, the court being one of record, did not terminate the case; it remained pending in court to await the preparation and entry of the final order or judgment." Id., p. 228.

It is significant to note at this point that in Appellant's case before this Court, his (Appellant's) withdrawal of guilty plea "was instant and immediate upon the oral announcement made by the Court of its decision."

The second case in the evolutionary chain is Freeman v. Brown, 115 Ga. 23 (1902). This was a suit against the administrator of a will to cover amounts due certain legatees.

Plaintiff moved to amend his petition before the court stenographer had finished transcribing the decision of the court and before the decision was signed by the court. The Supreme Court in Freeman held:

> "The oral announcement of the judge was no judgment, neither were the shorthand notes of the stenographer or the matter and language of this oral announcement the judgment of the court, and certainly the uncompleted transcription of these notes into longhand was no judgment. What the judge orally declares is no judgment until it has been put in writing and entered as such." Id., p. 27.

The third principal case and first criminal case in the evolutionary chain is Easterling v. State, 14 Ga. App. 134 (1912). The issue in Easterling was whether the oral announcement of the trial judge, on the hearing of a motion for new trial, amounted to a judgment from which an appeal could be entered. The court held:

> "A judgment is the decision or sentence of the law, pronounced by the court and entered upon its docket, minutes, or record. A judgment of a court can only be shown by its records. Where there is no record, there is no judgment." Id., p. 135.

The Easterling court concluded from the Lytle and Freeman decisions that the mere oral announcement by the trial judge on the hearing of the motion for new trial, that the motion would be overruled, was not a judgment. Easterling, supra, p. 136. The court significantly noted that the judgment had not been signed by the judge, nor had a judgment been entered on the minutes of the court.

From the trilogy of cases discussed above has evolved the rule which has been followed in substantially every criminal case dealing with the plea withdrawal issue since 1912.

The question in Rutland v. State, 14 Ga. App. 746 (1914) was basically whether it was within the power of a judge of the superior court, after the adjournment of the term at which the sentence was imposed, to alter or amend a sentence entered upon the minutes of the court. With respect to the point as to the legal validity of the so-called oral sentence, the Rutland court held:

> "That this point has since been expressly ruled upon in Freeman v. Brown," Rutland, supra, p. 751.

In Matthews v. Swatts, 16 Ga. App. 208 (1915), a habeas corpus proceeding, the Court of Appeals again cited approvingly the language of Easterling and Freeman, supra:

"It is well settled that oral announcements of a judge are no part of his judgment in a case." (p. 209).

In Morgan v. Mount, 195 Ga. 281 (1943), a habeas petitioner proclaimed that his sentence did not conform to the oral statements of the trial judge. It was held in Morgan that oral testimony could not have the effect of changing the legal sentence as put in writing and signed by the judge, since it was the signed writing, and not the previous oral announcement, which constituted the legal sentence (p. 281).

The true rule was succinctly stated by the Georgia Court of Appeals in Clark v. State, 72 Ga. App. 603 (1945) wherein the Court held:

"In the superior court an oral announcement by the judge as to what sentence will be imposed is not a pronouncement of the sentence within the contemplation of the statute."

One year after Clark, supra, the Georgia Supreme Court likewise held that oral declarations of the judge constitute no part of the sentence until they have been put in writing and duly entered as such. Long v. Stanley, 200 Ga. 239, 241 (1946).

In 1947, relying on Clark and Long, among others, supra, the Court of Appeals with definity stated the meaning of

"pronouncement" as it appears in Code 27-1404:

> "The pronouncement upon the prisoner of the judgment of the law, as provided for in 27-1404 of the Code, consists of the signing of the written sentence by the presiding judge and its delivery to the clerk for the record, and any oral announcement by the judge as to what the sentence is to ve is no part of such pronouncement." Wright v. State, 75 Ga. App. 764.

More recent cases are in accord with Clark, Long, supra, and the other earlier cases. Farmer v. State, 128 Ga. App. 416 (1973); Ballard v. State, 131 Ga. App. 847 (1974); Williams v. State, 148 Ga. App. 521 (1978). Denial of absolute right of defendant to withdraw guilty plea constitutes reversible error.

Particularly noteworthy about the Ballard case, supra, is the similarity to the instant fact situation as it existed at the time of sentencing. In Ballard, the defendant attempted to withdraw a guilty plea to the offense of unauthorized entry of a dwelling house. The trial court refused the motion and stated that he had signed the judgment before announcing sentence so that it could not be withdrawn, Id., p. 848, 849. Held, the trial court clearly intended to cut off the right of the defendant to withdraw the plea. Id., p. 849.

Along the evolutionary chain there appears to be, at first glance, some "rusty links" which might cause some confusion. However, upon careful examination of those rusty links, the "rust" of those cases dissolves and the chain emerges untarnished.

One such "rusty link" is the case of Griffin v. State, 12 Ga. App. 615 (1913). Griffin held that judgment is pronounced within the purview of Code 27-1404 whenever the defendant is officially informed by the court of the sentence to be entered against him. This case involved plea bargaining between the State and defendants. Based on the "bargain" the defendant pled guilty. The trial court subsequently imposed a harsher sentence. On appeal, although the Court of Appeals reversed the trial court, it did so because the Court of Appeals felt that the defendants' mistaken belief that they would get a lesser sentence on a plea of guilty, was not such negligence on their part as to deprive them of a right to a jury trial. Id., p. 630. The language of the Griffin case could easily be confused and construed to mean that "pronouncement" under Code 27-1404 means oral announcement. Such is clearly not the case as was demonstrated in Clark v. State, supra.

> "It is well to note in this case (Griffin) the court was dealing with the question of withdrawing a plea of guilty after a written sentence had been signed and pronounced. That is not the question here." Clark, supra, pp. 611, 612.

Another "rusty link" is the case of Sanders v. State, 18 Ga. App. 786 (1916). In Sanders, as in Griffin, it appears that a legal sentence had been pronounced before the motion to withdraw the plea was made. Of the Sanders case it is said in the Clark case, supra, p. 613, that:

> "The first headnote reads: Where the record conflicts with the bill of exceptions, the record controls. This court held in that case that although the bill of exceptions recited that the defendant moved to withdraw his plea of guilty before a written sentence was pronounced upon him, the sentence itself contradicted such allegation in the bill of exceptions. The court held that the record, that is the sentence, was controlling and not the recitals of fact in the bill of exceptions. Hence, it follows that anything which the court might have said in the second headnote of that opinion is obiter dictum."

If Griffin and Sanders stand, which they clearly do not, for the proposition that Code 27-1404 does not permit defendants to withdraw their guilty pleas once they are told of their sentence, then these two cases are clearly not correct inasmuch

as they fly directly in the face of the overwhelming majority of cases on the issue. At a minimum, such a rule, if it exists, has been necessarily overruled by implication.

Thus, having reviewed the law with regard to withdrawal of a guilty plea, it is readily apparent that Appellant complied with the law as it currently exists in Georgia. Immediately after the trial judge orally announced the sentence, Appellant's counsel both orally (T-484) and in written form (T-487, R-9-22) withdrew Appellant's plea of guilty. Both the oral and written withdrawals were accomplished prior to the trial judge handing the sentence to the Clerk. The trial judge himself, contrary to remarks from the District Attorney, acknowledged the fact that Appellant's withdrawal of guilty plea both in written form and orally, was accomplished prior to the Clerk receiving the written sentence of the Court:

> "For the record counsel for the defendant placed on the Clerk's desk just a fraction of a second before I handed my written sentence to the 'Court' apparently his withdrawal, and started what I consider to be an unauthorized shouting type of interruption of the court." (T-490).

It is therefore unalterably true that the trial court erred in denying Appellant's withdrawal of guilty plea.

The sentencing phase of Appellant's case is not too dissimilar from what occurred in Ballard v. State, supra. As in Ballard, the trial judge here had deliberately signed a sentence written out in its entirety "anticipating that counsel for the defendant would have to take this into consideration" (T-490) clearly intending to cut off the right of Appellant to withdraw the plea. See Ballard at p. 849.

With respect to the trial judge's argument that Appellant's counsel acted contrary to Local Rule 70.6 (T-490), that rule provides:

> "In all criminal felony cases in which pleas of guilty have been entered, the plea of guilty may be withdrawn only in open court before the judge who received the plea of guilty. Until and unless a plea of guilty is withdrawn, the case in which the plea of guilty has been entered shall not be presented to any other judge for disposition."

There is no requirement in Local Rule 70.6 that counsel be "properly before the court," and even if there was a requirement, there is nothing in Code 27-1404 which requires Appellant, his counsel or anyone else to be properly before the Court prior to withdrawing a guilty plea. If in fact Local Rule 70.6 requires such a condition, then Local Rule 70.6 is in contravention of a general statute on this same subject and as such,

Local Rule 70.6 is invalid, Ga. Code Ann. §2-401 (Rev. 1948).

Finally, assuming that the law as it currently exists in Georgia with respect to withdrawal of guilty pleas allows the accused to trifle with and play games with the Court (T-485, 486), it is not for the appellate courts to change, but the legislature.

In Burkett v. State, 131 Ga. App. 177 (1974), the Court of Appeals held:

> "The rule in most jurisdictions is that one who enters a plea to an accusatory pleading does not have the absolute right to withdraw a plea; the granting or refusing of leave to withdraw a plea in a criminal case rests in the sound discretion of the trial judge, subject to review for abuse of discretion. However, in Georgia this common law power of the trial judge was taken away from him by the General Assembly, and an accused has the right to withdraw the plea prior to judgment...
>
> The District Attorney makes a very logical argument against the above rules saying that it allows the accused to trifle with and play games with the court. The answer is that the law on this question is not simply what the judges of this court think the law should be, but what the General Assembly said it is... Horton v. Brown, 117 Ga. App. 47, 49."

In accord with Burkett, supra, is Williams v. State, 148 Ga. App. 521, 522 (1978):

> "This Court recognizes that an unscrupulous defendant may occasionally utilize his right to withdraw his guilty plea in an attempt to gain an unwarranted delay in the trial of his case... However, we feel that the intent of the legislature in establishing the present statutory procedure must be closely adhered to."

However, assuming this Court is inclined to change the law as it currently exists in Georgia with regard to withdrawal of guilty pleas, Williams v. State, supra, such change should apply prospectively only and not retroactively. Appellant should be permitted to rely on the law as it existed at the time he withdrew his plea of guilty. Anything short of this would have the effect of abridging Appellant's vested or substantive procedural rights. An analogy can be made here with respect to the award of attorney's fees and expenses as additional damage in condemnation cases. The Court in Department of Transportation v. Worley, 150 Ga. App. 768, 769 (1979) affirmed the rule that owners in condemnation cases have vested rights to just and adequate compensation which cannot be destroyed by applying the law existing as of the date of the appeal to a case

that has already been tried. If there are any rights afforded a criminal defendant with respect to verdict and sentence, they belong first to the capital defendant.

8.

Inasmuch as the trial court erred in refusing to allow Appellant to withdraw his guilty plea as a matter of right (see Enumeration of Error No. 7), when given the opportunity to exercise his discretion and grant Appellant's motion to withdraw his guilty plea, said trial court abused its discretion by denying said motion.

As additional evidence of abuse, Appellant would refer to the voluminous amount of immaterial evidence the trial court admitted over objection of Appellant's counsel (see Exhibit "A" attached hereto). Appellant, by his plea, was not attempting to shield the trial court from any relevant evidence, however, the evidence admitted over objection (Exhibit "A") had no probative value insofar as the punishment phase of the case was concerned. Appellant does not debate the "rightness or wrongness" of his decision to plead guilty, however, having done so Appellant and his counsel were concerned only that the case be properly conducted with only relevant and material evidence introduced. The trial court by admitting voluminous evidence with no probative value, "stacked the deck" against Appellant so as to strip Appellant's plea of guilty of whatever beneficial effect it could or should have had.

9.

The trial court erred in denying Appellant's oral and written motions for an evidentiary hearing with respect to what transpired at Appellant's sentencing hearing. (R. 9-22).

It is clear from Georgia statutory and case law as well as the Eighth Amendment to the United States Constitution that the fulfillment of the right to appeal is dependent on a reliable, complete record of the case below. Indeed, before a death sentence can be reviewed for its constitutionality or for any other purpose, it goes without saying that there must be a complete record for the appellate courts to review.

In all felony cases the transcript of evidence and proceedings shall be reported and prepared as provided by law. Ga. Code Ann. §6-805(a).

Where a trial in any civil or criminal case is reported by a court reporter, all motions, colloquies, objections, rulings, all evidence - whether admitted or stricken on objection or otherwise - copies or summaries of all documentary evidence, the charge of the court, and all other proceedings which may be called and questioned on appeal or other post-trial procedures shall be reported, and where the report is transcribed, all such matters shall be included in the written transcript, it being the intention of this law that all these matters appear in the record, rather than in assignments of error on appeal or otherwise, which are abolished by this law. Where matters occur

which were not reported, such as objections to oral argument, misconduct of the jury, or other like instances, the court, upon motion of either party, shall require that a transcript of these matters be made and included as part of the record... Code Sec. 6-805(d).

Where any party contends that the transcript or record does not truly or fully disclose what transpired in the trial court and the parties are unable to agree thereon, the trial court shall set the matter down for a hearing with notice to both parties, and resolve the difference so as to make the record conform to the truth. If anything material to either party is omitted from the record on appeal or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and, if necessary, that a supplemental record shall be certified and transmitted by the Clerk of the trial court. Code Sec. 6-805(f).

Thus, under the authorities stated above, if, in fact, the withdrawal of guilty plea procedure is a "race to clerk" affair as the case law indicates, then defense counsel should have the opportunity to call witnesses who would testify as to who did what and when, especially when such a motion was orally made (T-491, 495-496) and denied at the sentencing hearing in this case.

It is significant to note that the trial court stated that he would allow Appellant's counsel an opportunity to later perfect the record in regard to when the withdrawal was made in relation with the filing of the sentence. (T-491). Further, the District Attorney is in total agreement with Appellant's counsel that Appellant is entitled to an evidentiary hearing with respect to the guilty plea withdrawal (R-125). The District Attorney differs with Appellant's counsel on this point only in regard to which judge should preside at the hearing (R-125).

Therefore, for the reasons assigned herein, the trial court erred in denying Appellant's motions for an evidentiary hearing.

10.

The trial court erred in denying Appellant's motion for new trial (R-139, 140).

Appellant entered a plea of guilty to the charge of murder in Hall County Superior Court, Gainesville, Georgia, being indictment number K-45668, on August 14, 1979 (R-90, 91). Before sentence was pronounced and entered, Appellant withdrew his guilty plea on August 16, 1979 (T-484, 487). The trial court denied Appellant's withdrawal of guilty plea and proceeded with the entry of the sentence, that being the imposition of the death penalty (T-491). Appellant subsequently moved for a new

trial which motion was denied (R-149, 150).

The trial court erred in denying Appellant's motion for new trial for the reasons that the judgment of the Court as a fact finder on the issue of punishment was contrary to law, the judgment of the Court as a fact finder on the issue of punishment was contrary to the evidence, the judgment of the Court as a fact finder on the issue of punishment was strongly against the weight of the evidence, and the judgment of the Court as a fact finder on the issue of punishment failed to consider that the Court was not compelled under the law, as was stated by the Court (T-494), to impose the death sentence upon the Appellant. Further, the trial court erred in denying Appellant's motion for new trial for the reason that the guilty plea was effectively withdrawn by Appellant before pronouncement and entry of sentence by the Court (T-484, 487, 490).

CONCLUSION

For the reasons assigned herein, Appellant respectfully requests that this Court grant Appellant a new trial or, in the alternative, overturn the death penalty which was imposed on Appellant by the trial court.

George W. Brinson

George W. Brinson

Michael R. Casper

Michael R. Casper

ATTORNEYS FOR APPELLANT

EXHIBIT "A"

(1) Motion in Limine - T.22, ruling reserved - T.29.

(2) Motion in Limine - (Photos of Hoyt Turner) T.29, ruling reserved - T-33.

(3) Objection by Appellant as to any matters pertaining to Habersham County indictment - T.65, overruled - T.72, (the Court allowed this objection to be continuing, T.72).

(4) Objection (photos of Belton Bridge) - T.74, overruled T.75.

(5) Objection (photos of pickup truck) - T.76, overruled - T.78.

(6) Objection as to Habersham County evidence - T.93, overruled T.93.

(7) Objection (photos - Whitlock trailer) - T.103, overruled T.103.

(8) Objection (Turner autopsy report and testimony) - T.105, overruled T.105.

(9) Objection (Turner photos) - T.108, overruled T.108.

(10) Objection (medical testimony - Dr. Dawson) - T.111, overruled T.111.

(11) Objection (Turner autopsy report and testimony) - T.114, overruled T.114.

EXHIBIT "A"

(12) Objection (pathologist's testimony as to angle of bullet in Turner) - T.124, overruled T.124.

(13) Objection (Habersham County photos) - T.128, overruled T.128.

(14) Objection (Exhibit 41, bullets from Turner) - T.161, overruled T.161.

(15) Objection (Nations' testimony re Habersham County) - T.167, overruled T.167.

(16) Objection (testimony re Habersham County) - T.200, overruled T.200.

(17) Objection (Land testimony re Habersham County) - T.252, overruled T.252.

(18) Objection (Habersham County testimony) - T.292, overruled T.292.

(19) Objection (Threatt's testimony relating to Habersham County) - T.332, overruled T.332.

(20) Objection (Marable's testimony concerning Habersham County) - T.359, overruled T.359.

In The Superior Court
of Habersham County
Ga.

State of Ga
vs.
Keith Fair No _____

Verdict

We find the Defendant
Not Guilty

This 16th Day of Nov. 1979

Gertrude B. O'Hare
FOREPERSON

GEORGIA, HABERSHAM COUNTY
This is [illegible] within document
is a true [illegible] on file
in this [illegible]

This 21 [illegible] Nov. 1979
[illegible]
Clerk, Superior Court

GEORGIA, HABERSHAM COUNTY.

The grand jurors selected, chosen, and sworn for the County of HABERSHAM to-wit:

1. Mrs Curtis Stinespring Jr.
2. Malin Roger Bentley
3. Wiles Barrett
4. Tim Terrell Craven
5. John W. Mucks
6. Bomar Amos Olds, Jr.
7. F. Lee Sellers, Jr.
8. Billy Barrett
9. Larry Clark Parham
10. Harry F. Purvis
11. James R. Acrey
12. Fred Scroggs
13. Mrs Herman (Linda) Benfield
14. Mrs. L. R. Holbrook
15. Mrs L. Y. Drew
16. Howard Clyde
17. Robert L. Hawkins
18. Cole Allen
19. Charles E. Barrett
20. Stanley Knight
21. Cortez Farrell
22. Charles Roy Davis
23. Ronald J. Parham

in the name and behalf of the Citizens of Georgia, charge and accuse KEITH FAIR

of the County and State aforesaid, with the offense of MURDER

for that the said KEITH FAIR

on the 8th day of MAY in the year 19 79, in the County aforesaid, did unlawfully

and with malice aforethought kill one Edmond Hoyt Turner, a human being, by shooting the said Edmond Hoyt Turner with a certain pistol,

GEORGIA, HABERSHAM COUNTY
This is to certify that the within documen[illegible] is a true and correct copy of the original on f[illegible] in this office.
This 26th day of Nov. 1979
Ernest W. Nationig[illegible]
Clerk [illegible] Cou[illegible]

contrary to the laws of said State, the good order, peace and dignity thereof.

Superior Court of said County AUGUST TERM, 19 79

H. D. STOCKTON, DISTRICT ATTORNEY

The Defendant _____ waives being formally arraigned and pleads not guilty.

This 12 day of November 1979.

_____ District Attorney

Copy of bill of indictment and list of witnesses sworn before Grand Jury waived before arraignment.

_____ Defendant's Attorney

_____ Defendant

WITNESSES

EY L. THOMPSON, GBI ✓

STOWE, GBI ✓

ATTAWAY, HALL CO. S.D.

N WHITLOCK.

R SEGERS

R THOMAS ✓

ILL LAND 11-16-79

A NATIONS

YON DAWSON, CRIME LAB

PITTS

Turner

Fite

Wallraven

n P. Threatt

Ray Pearson

l Marable

a- 8-14-79

ed- 8-9-79

HABERSHAM

SUPERIOR COURT

TERM, AUGUST 1979

THE STATE

vs.

KEITH FAIR

MURDER (26-1101)

True Bill

Harry D. Purvis Foreman

V.D. STOCKTON, DISTRICT ATTY.

ROBERT F. PITTS Prosecutor

CERTIFICATE OF SERVICE

I, GEORGE W. BRINSON, do hereby certify that I have furnished a copy of the foregoing Brief of Appellant, by mail, to:

Honorable Jeff C. Wayne
District Attorney, Northeastern
Judicial Circuit
P. O. Box 1690
Gainesville, Georgia 30503

and

Honorable Arthur K. Bolton
Attorney General
Room 132, Judicial Building
Atlanta, Georgia 30303

in a properly addressed envelope with sufficient postage thereon to carry same to its destination.

This 26 day of November, 1979.

George W. Brinson
GEORGE W. BRINSON

APPENDIX B - OPINION OF THE GEORGIA SUPREME COURT

In the Supreme Court of Georgia

Decided: APR 09 1980

35701. FAIR v. STATE

BOWLES, Justice.

Keith Fair, the appellant, pled guilty in the Superior Court of Hall County to the murder of Jackie Morris. The trial judge, after a two day pre-sentence trial, found the existence of two statutory aggravating circumstances and imposed the death penalty. The case is here on direct appeal.

This case involves two killings by appellant. The trial judge, as the finder of fact, was authorized to find that the first killing occurred in Habersham County as a result of a dispute over a money matter. Apparently the Habersham County victim had hired appellant to burn a trailer for him and then did not have the money to pay. In front of his other accomplices, including Jackie Morris, hereinafter the Hall County victim, appellant shot the Habersham County victim at point blank range in the face, then threw him on the ground and shot him again, laughing all the while. The body was disposed of in Lake Lanier.

Later that night, appellant determined that the Hall County victim would have to be killed as well since he had been a "rat" in prison. Appellant pretended to need help with a wheel on an automobile and when the victim leaned over to help, appellant shot him in the head, laughing and saying, "you wasn't nothing but a rat you son-of-a-bitch no way, you pulled a knife on me when I was thirteen years old and scared the hell out of me." The body was placed in the car; the victim's throat was cut by another accomplice; and the car was set on fire.

After his arrest, the appellant bragged about the killing of the Hall County victim to other inmates. He also stated that when he got out he was going to kill the other witnesses. In conversation with other inmates he said that he was not sorry about the killing and did not lose any sleep over it. Appellant escaped from jail with another inmate to whom he admitted both killings. During the period he was a fugitive, he told the inmate he escaped with that the victims were criminals like him and deserved it but that he did not want to be shot because when he shoots people they "squeal like it hurts." Appellant was re-captured within a day and a half.

1. The appellant attacks the constitutionality of the Georgia Death Penalty Statute, Ga. Laws, 1973, pp. 159, et. seq. (Code Ann. § 27-2634.1) as written and applied. Both this court and the Supreme Court of the United States have upheld the constitutionality of the Georgia statute in a number of cases and appellant has advanced no new reason for us to reconsider our position. See Gregg v. Georgia, 428 U. S. 153 (1976); Eberheart v. State, 232 Ga. 247 (206 SE2d 12) (1974); McCorquodale v. State 233 Ga. 369 (211 SE2d 517) (1974); Smith v. State, 236 Ga. 12 (222 SE2d 308) (1976); Mason v. State, 236 Ga. 46 (222 SE2d 339) (1976); Birt v. State, 236 Ga. 815 (225 SE2d 248) (1976); Legare v. State, 243 Ga. 744 (257 SE2d 247) (1979). Appellant's first enumeration of error is without merit.

2. The appellant in his second enumeration of error argues that the trial court erred in admitting evidence of the murder of the Habersham County victim and relying upon that evidence in its finding of one of the statutory aggravating circumstances warranting the death penalty.

Appellant was given proper notice that the evidence of the Habersham County murder would be tendered in aggravation. At the

pre-sentence trial, his appointed attorney in the Habersham County case advised appellant to assert his Fifth Amendment privilege as to any question concerning the first murder. However, this in itself would not have prevented appellant from presenting evidence in defense of the Habersham County murder before the trial court in the instant case. The appellant had to choose which course to follow. Though a defendant may have a right, even a constitutional right to follow a certain course of action, it does not necessarily follow that to require him to choose a course of action is constitutionally forbidden. Decisions as to what course to follow in a criminal case are many times difficult. See McMann v. Richardson, 397 U. S. 759 (1970). The appellant contends that the evidence of the Habersham murder should not have been introduced against him in aggravation because he had only been charged with that murder, had not been convicted, but was awaiting trial thereon. It is the rule in this state that it is not required that a defendant be convicted of the crime introduced as an aggravating circumstance. Hooks v. State, 233 Ga. 151 (210 SE2d 688) (1974); Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979). Appellant's reliance upon Code Ann. § 27-2534.1(b)(1) is

misplaced in that the record clearly shows that the state relied upon and the trial court found that the murder occurred during the commission of another capital felony. Code Ann. § 27-2534.1 (b) (2).

Appellant further argues that the evidence was totally irrelevant and, therefore, inadmissible. We do not agree. The first murder was committed within hours of the second. The motive for the murder of the Hall County victim was to silence him so he would not be able to testify against the appellant regarding the first murder. The arson of the trailer, the murder in Habersham County, the murder in Hall County and the arson of the car in Hall County were all part of a continuous transaction and all were mutually dependent crimes. Collins v. State, 239 Ga. 45 (235 SE2d 523) (1977); Stewart v. State, 239 Ga. 588 (238 SE2d 540) (1977). Had the appellant plead not guilty and elected to go to trial on guilt-innocence, the evidence complained of would have been admissible to show scheme, motive, or intent. McClesky v. State, 245 Ga. 108 (SE2d) (1980). It, therefore, follows that such evidence was certainly admissible during the presentence trial in which additional evidence, not admissible

during the guilt-innocence phase, is allowed. Code Ann. § 27-2503. See, Spivey v. State, 241 Ga. 477 (246 SE2d 288) (1978). Furthermore, such evidence is not inadmissible on the ground that it places the defendant's character in evidence. During the pre-sentence hearing, the State, subject to notice limitations, is allowed to place the defendant's character in issue through his prior record or other criminal acts. Code Ann. §§ 27-2503; 27-2534.1. A defendant in a capital case stands before the trial court or jury in a pre-sentence trial a convicted felon with no presumption of innocence. All aspects of his crime or crimes, his character and his attitude are admissible, subject to the applicable rules of evidence regarding reliability, to guide the fact finder in determining appropriate sentence. See, Lockett v. Ohio, ____ U. S. _____ (98 S. C. 2954) (1978); Collier v. State, supra.

Appellant asserts that the trial court's finding that the offense of murder occurred while the offender was engaged in another capital felony: to-wit, the murder of the Habersham County victim, cannot stand because at his subsequent trial for that offense in Habersham County, the appellant was acquitted.

Appellant's subsequent acquittal is not part of the record in this case. Nevertheless, assuming such an acquittal, we find no error. Necessarily, two different triers of fact were involved. Different triers of facts may reach different results. See, Chaffin v. Stynchcombe, 412 U. S. 17 (1973). Under our statute, the fact finder in a pre-sentence trial must determine whether beyond a reasonable doubt any of the statutory aggravating circumstances exist under the evidence presented. Code Ann. §§ 27-2503; 2525, 2534.1. A review of the evidence presented to the trial judge in this case overwhelmingly supports a finding by a rational trier of fact that the appellant was engaged in the commission of another murder when he killed the Hall County victim. Jackson v. Virginia, ____ U. S. _____ (99 S. Ct. 2781) (1979).

In the instant case, the murders were committed in separate counties which of necessity required that one murder be tried before the other.[1/] The subsequent acquittal simply has no bearing on the issue of whether the trier of fact is presented with sufficient evidence to find beyond a reasonable doubt the existence of an aggravating circumstance.

1/ What evidence may have been presented in the second murder trial regarding the first homicide is not before the court, but we can unhesitatingly say that the evidence of the first homicide presented in the instant case was entirely sufficient to prove it.

3. The trial court also found an additional aggravating circumstance in that the murder of the victim in this case was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind on the part of the defendant. The appellant argues that such a finding under Code Ann. § 27-2534.1 (b)(7) is incomplete in that the statute requires a finding of either torture or aggravated battery in addition to a finding of depravity of mind. Code Ann. § 27-2534.1(b)(7) provides as follows: "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." The statute is worded in the disjunctive, not the conjunctive. It is not required that a trier of fact find the existence of each disjunctive phrase of the statute, only that at least one phrase of the first clause of the statute exists due to the existence of at least one phrase of the second clause of the statute. Furthermore, this court has upheld an identical finding of this statutory aggravating circumstance in Corn v. State, 240 Ga. 130 (240 SE2d 694) (1977).

The evidence supports a finding of this aggravating circumstance by a rational trier of fact beyond a reasonable doubt, Jackson v. Virginia, supra.

The evidence shows that the appellant killed his accomplice in an arson case who also happened to be a witness to a murder to prevent any chance the victim would testify against him. It was cold blooded, performed in a methodical, execution-type manner, and the body was burned to destroy any evidence against the appellant. The appellant laughed during the murder of his victim, cursed him and later told others he did not lose any sleep over the killing. He described how people "squealed" when he shot them. Such evidence shows a vile, inhuman murder due to a complete and absolute disregard for human life which is shocking to the conscience of civilized man. It cannot be argued that such actions on the part of the appellant do not evidence a complete depravity of mind. Appellant's third enumeration of error is, therefore, without merit.

4. In his fourth and eighth enumerations of error, the appellant argues that the court erred in admitting evidence of the subsequent escape from jail and his conversations with other inmates. The appellant contends the evidence is inadmissible because it places his character in evidence. As noted above, the instant case was a pre-sentence trial. The appellant admitted

his guilt in open court and waived any right to trial on guilt or innocence. The purpose of a pre-sentence trial is to introduce different evidence from that at trial to determine guilt or innocence. On the issue of guilt or innocence, the only relevant evidence is that which pertains to the offense with which the defendant is charged. In a pre-sentence trial the trier of fact must make a determination as to the sentence to be imposed, taking into consideration all aspects of the crime, the past criminal record or lack thereof, and the defendant's general moral character. Johnson v. State, 126 Ga. App. 757 (191 SE2d 614) (1972); Code Ann. §§ 27-2503, 2528, 2534.1. Any lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes is admissible in aggravation, subject to the notice provisions of the statute. Each case is necessarily different; however, such evidence, by way of illustration, may consist as it did here of the defendant's attitude concerning his crime and the victim, the trier of fact's personal observation of the defendant, his conduct after incarceration and evidence of subsequent crimes. See, Ingram v. State, 134 Ga. App. 935

(216 SE2d 608) (1975). In a capital felony pre-sentence trial, the State is not limited to the introduction of evidence to support the particular statutory aggravating circumstances it is relying upon. Upon review of the record, we conclude that the evidence was relevant to sentence and admissible. The evidence being admissible, the trial court did not abuse its discretion in failing to allow the withdrawal of the appellant's guilty plea on the ground that sentence was based upon erroneously admitted evidence.

5. In his fifth enumeration of error, appellant asserts error in the introduction of photographs of the bodies of his victims over objection. This enumeration is clearly without merit, especially in view of the fact that such evidence was presented to the trial judge sitting without a jury. Tucker v. State, 245 Ga. 68 (____ SE2d ____) (1979); Stevens v. State, 242 Ga. 34 (247 SE2d 838) (1978); White v. State, 242 Ga. 21 (247 SE2d 759) (1978); McCorquodale v. State, supra. See Ingram v. State, supra.

6. Appellant contends in his sixth enumeration of error that the trial judge did not consider the appellant's intoxication as a mitigating factor in imposing sentence. While it is undisputed

that the appellant was drinking intoxicating beverages on the day in question, there was no evidence presented which in any manner showed that the appellant was so intoxicated as to not be able to form the requisite criminal intent nor understand the nature of his actions. Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979). Plaintiff argues that the trial judge did not include intoxication to the extent of impairment of intent and ability to comprehend the criminality of his actions as a mitigating circumstance on the judge's report. However, this does not indicate that the judge failed to consider it as a possible mitigating circumstance.

The appellant relies on an isolated portion of the judge's sentence to show that the trial court failed to take into consideration any mitigating circumstances and sentenced solely on the basis that statutory aggravating circumstances were found, thereby requiring the imposition of a death penalty. Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1972). However, a review of the record in this case shows that the judge considered all the circumstances both in mitigation and aggravation in arriving at his sentence. In fact, the trial judge recited that he considered all the evidence, both in aggravation and mitigation in his finding of

aggravating circumstances as required by Code Ann. § 27-2525. Spivey v. State, supra.

7. The appellant upon call of the case tendered a guilty plea. The trial court exhaustively examined the appellant to determine if the plea was voluntarily and intelligently given. The court thereafter informed the appellant and his counsel that the court was not conscientiously opposed to capital punishment and would impose such a sentence if the facts warranted it. The court then required the appellant to confer with his counsel and recessed for that purpose. Thereafter, the appellant again insisted on a guilty plea. A pre-sentence trial was held pursuant to Code Ann. §§ 27-2528, 27-2503 and 27-2534.1. The State introduced proof not only of the aggravating circumstances but of the crime itself. After the trial court made its findings of fact and orally announced sentence the appellant moved to withdraw his plea. Withdrawal came prior to the clerk receiving the sentence and spreading it upon the record. Appellant enumerates as error the trial judge's refusal to hold an evidentiary hearing to correct the record. However, the appellant's attorney was allowed to perfect the record, and the record adequately reflects the

attempt to withdraw the plea prior to the clerk's receiving it. Neither the trial judge nor the State contest appellant's assertion that the withdrawal came prior to the clerk's receiving the sentence. Appellant's ninth enumeration of error is without merit. See, Patterson v. State, 233 Ga. 724 (213 SE2d 612)(1975); Code Ann. § 6-805(f).

8. Appellant asserts error on the trial court's refusal to allow withdrawal of his guilty plea. The appellant contends that at any time prior to the sentence being received by the clerk and entered upon the docket, a defendant, as a matter of right, may withdraw his plea of guilty. Appellant cites as authority Code Ann. § 27-1404 and cases decided thereunder. Code Ann. § 27-1404 provides in relevant part as follows:

> "...If he shall plead 'guilty,' such plea shall be immediately recorded on the minutes of the court by the clerk, together with the arraignment; and the court shall pronounce upon such prisoner the judgment of the law, in the same manner as if he had been convicted of the offense by the verdict of a jury; but, at any time before judgment is pronounced, the prisoner may withdraw the plea of 'guilty,' and plead 'not guilty,' and such former plea shall not be given in evidence against him on his trial."[2/]

2/ The statute first appeared at page 834 in Cobb's Digest of the Laws of the State of Georgia published in 1851. Under the common law, a prisoner had no absolute right to withdraw his plea either before or after sentence. Therefore, the statute is in derogation of the common law. Woodward v. State, 13 Ga. App. 130 (78 SE 1009) (1913), dissent of Pottle, J.

The question thus presented is whether or to what extent Code Ann. § 27-1404 applies to Ga. Laws 1973, p. 159 et. seq. which provided for comprehensive new procedures in capital felony cases.

This is a question of first impression as guilty pleas are rare when the State has not waived the death penalty.[3/] From 1956 until the present death penalty statute, if a defendant plead guilty and such a plea was accepted, the maximum penalty that could be imposed was life imprisonment. Ga. Laws 1956, p. 737 (Former Code Ann. § 27-2528). However, under the new Act, there is no such limitation and the trial judge, provided he finds the existence of a statutory aggravating circumstance, may impose a death penalty. Ga. Laws 1973, pp. 159, 171 (Code Ann. § 27-2528).

The present death penalty statute, Ga. Laws 1973, p. 159 et. seq. created a comprehensive new procedure for the trial and imposition of the death penalty in capital felony cases. The statute requires a finding by the trier of fact of at least one specific statutory aggravating circumstance before a death sentence is authorized. The State must prove the existence of such an aggravating circumstance beyond a reasonable doubt.

3/ There are only three cases involving a plea which resulted in a sentence of death under the present statute; Hooks v. State, 233 Ga. 149 (210 SE2d 688) (1977); Moore v. State, 233 Ga. 861 (213 SE2d 829) (1975) and Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975). These cases do not address the question.

The trial of a capital felony is, therefore, in two parts: one to determine guilt or innocence and the other to determine sentence. In both phases, the State carries the burden of proof. In a non-capital felony, the judge conducts a pre-sentence hearing to determine sentence and the State may tender evidence of aggravation if it so chooses, but no factual finding is required to authorize imposition of any sentence within the statutory limits. Code Ann. § 27-2503.

Against this background we must construe the two statutes in question, keeping in mind the legislative intent, the old law, the evil and the remedy. Code Ann. § 102-102.

The purpose of the withdrawal provision of Code Ann. § 27-1404 is to provide a necessary part of the plea bargaining procedure, Smith v. State, 231 Ga. 23 (200 SE2d 119) (1973). Its provisions have been held to apply to nolo contendre pleas, Wright v. State, 75 Ga. App. 764 (44 SE2d 569) (1947), but not to pleas which result in first offender treatment, Heath v. State, 148 Ga. App. 559 (252 SE2d 4) (1978), because to do so would frustrate the purpose of the First Offender Act.

Where a plea of guilty is entered in a capital felony case and the State seeks the death penalty under Code Ann. § 27-2534.1,

plea bargaining is not involved nor could it ever be involved. Therefore, Code Ann. § 27-1404 would have no purpose under such a circumstance. Furthermore, to apply Code Ann. § 27-1404 to such a situation would frustrate the purpose of Ga. Laws 1973, pp. 159, 171, in that the plea could be withdrawn as a matter of right after the defendant learns a death sentence has been announced. Therefore, under this construction a death sentence could never be imposed upon a guilty plea if the defendant wished to avoid it.

Where a plea of guilty is filed in a non-capital felony, the judgment does not rest upon the results of a trial, but upon the plea, which is nothing more than a confession in judicio. Code Ann. § 27-1404 provides that the court, "...shall pronounce... the judgment, in the same manner as if he had been convicted of the offense by the verdict of a jury." However, in capital cases, the judgment does not rest upon the plea but rather upon the plea and the proof of an aggravating circumstance except in rare cases of treason or aircraft hijacking.[4/] Code Ann. § 27-2534.1(a). Capital cases, therefore, require further proceedings in all but two instances, a procedure not envisioned by Code Ann. § 27-1404. The decision of the trial court after a sentencing trial is

4/ The reports contain no such cases under the new statute, in which a death penalty was given.

tantamount to a jury verdict. For this reason and the others enumerated herein, this court concludes that the provisions of Code Ann. § 27-1404 relating to withdrawal of guilty pleas as a matter of right do not apply to guilty pleas tendered in capital cases other than treason or aircraft hijacking in which the State seeks the death penalty.[5/] We hold that a guilty plea, voluntarily and knowingly entered in a capital felony case other than treason or aircraft hijacking wherein the State seeks the death penalty under Ga. Laws 1973, p. 159 et. seq. may not be withdrawn as a matter of right.

9. In his last enumeration of error the appellant contends that the trial court erred in denying appellant's motion for new trial on general grounds and on the grounds previously considered. This enumeration has no merit. Upon review of the transcript and record we find that the verdict is factually substantiated and that the evidence supports such a verdict by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, supra.

10. As mandated by the statute, Ga. Laws 1973, pp. 159, 165 (Code Ann. § 27-2537) we have reviewed the transcript and record

5/ Nothing herein should be construed as approval by this court of the Court of Appeals' interpretation of Code Ann. § 27-1404 as permitting withdrawal of a guilty plea after sentence is orally pronounced.

in this case as we have in all prior cases under this statute. We find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find the similar cases listed in the appendix support affirmance of the death penalty.

Appellant's sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed. All the Justices concur, except Hall, J., concurs specially

APPENDIX

1. Henderson v. State, 227 Ga. 68 (179 SE2d 76) (1971
2. Kramer v. State, 230 Ga. 855 (199 SE2d 805) (1973)
3. Floyd v. State, 233 Ga. 280 (210 SE2d 810) (1974)
4. Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975)
5. Moore v. State, 240 Ga. 807 (243 SE2d 1) (1978)
6. Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978)
7. Burger v. State, 242 Ga. 28 (247 SE2d 834) (1978), aff'd on resentencing _____ Ga. _____ #35709, decided 3/14/80
8. Ruffin v. State, 243 Ga. 95 (252 SE2d 172) (1979)
9. Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979)
10. Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979)
11. Dampier v. State, _____Ga. _____ #35378, decided 2/20/80

HILL, Justice, concurring.

I concur in the judgment affirming the death penalty on the basis of the aggravating circumstance discussed in division 3 of the opinion, but not on the basis of the aggravating circumstance described in division 2, to wit: the Habersham murder of which the defendant was later acquitted.

In the Supreme Court of Georgia

JUN 24 1980

35701. FAIR v. STATE

ADDENDUM

(a) Subsequent to our decision in this case, but prior to transmittal of the remittitur to the trial court, the Supreme Court of the United States has decided Godfrey v. Georgia, 48 LW 4541 (May 19, 1980). In that the appellant's sentence of death rests partially[1/] upon Ga. Code § 27-2534.1(b)(7), his sentence must be reviewed in light of Godfrey.

Code Ann. § 27-2534.1(b)(7) provides in pertinent part: "The offense of murder. . . was outrageously vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." In Godfrey, the court found that § (b) (7) was unconstitutionally applied in that case. We find material differences between Godfrey and the case under review, which distinguish this murder from the murder in Godfrey and from other "ordinary" murders for which the death penalty is not appropriate.

1/The judge found the existence of two statutory aggravating circumstances, Code Ann. §§ 27-2534.1(b)(2) and 27-2534.1(b)(7). In Godfrey, the court was concerned with a sentence of death resting exclusively on § 27-2534.1(b)(7). Godfrey v. Georgia, 48 LW 4541, n.15. The other statutory aggravating circumstances are more "specific and measurable." Godfrey v. Georgia, 48 LW 4541, 4542, n.2. Therefore, under our decisions, the death penalty, infra, may be upheld upon § 27-2534.1(b)(2). Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979); Burger v. State, 245 Ga. 458 (SE2d) (1980).

In our opinion in this case, we held that the trial court's finding beyond a reasonable doubt that the murder was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind on the part of the defendant, was supported by the evidence. That evidence showed that appellant had had no quarrel with his victim. Rather the victim was killed simply because he had witnessed appellant's previous murder and appellant was afraid he would testify against him. While pretending they were still friends, appellant lured the victim into a vulnerable position and then shot him in the head. Aside from laughing during the killing itself, appellant showed no remorse thereafter but instead bragged about the killing and said he would kill the other witnesses when he got out of jail. Appellant's accomplice cut the victim's throat and appellant then burned the body. A defendant who mutilates or seriously disfigures a victim's body after death (cf. Code Ann. § 26-1305), may be found to have a depraved mind and such acts would be sufficient to show depravity of mind of the defendant within the meaning of the statute. (See Hance v. State, Case No. 36012, Decided June 24, 1980, after the main opinion in this case.) Appellant's actions in this case take this murder out of the category of "ordinary murders."

(b) The trial judge also found the existence of statutory aggravating circumstance Code Ann. § 27-2534.1(b)(2) in that the Hall County murder was committed in the course of another capital offense, the Habersham County murder.

Subsequent to our decision in this case, but prior to transmittal of the remittitur to the trial court, the Supreme Court of the United States decided Standefer v. United States, 48 LW 4634 (June 9, 1980). The following language from that case is relevant to our discussion in the main opinion of the effect of appellant's subsequent acquittal of the first murder in Habersham County:

> "This case does no more than manifest the simple, if discomforting, reality that 'different juries [may] reach different results under any criminal statute. That is one of the consequences of our jury system.' Roth v. United States, 354 U. S. 476, 492 (1957). While symmetry of results may be intellectually satisfying, it is not required." 48 LW at 4638.

Judgments of affirmance of the death penalty adhered to. All the Justices concur except Hill, J. who concurs in the judgment and in part (a) of the Addendum.